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Nos. 80-1640, 80-1656

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Petitioners,*

v.

STEVEN SHOLLY, *Et Al., Respondents.*

METROPOLITAN EDISON COMPANY *Et Al., Petitioners,*

v.

PEOPLE AGAINST NUCLEAR ENERGY *Et Al., Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY *ET AL.*

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July 31, 1981

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QUESTION PRESENTED

Whether Section 189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a), authorizes the Nuclear Regulatory Commission to amend a nuclear power plant operating license without first holding a hearing if one is requested, where the Commission determines that the amendment presents "no significant hazards consideration."*

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* In both No. 80-1640 and No. 80-1656, petitioners in the Court of Appeals below (respondents herein) were Steven Sholly, Donald Hossler and People Against Nuclear Energy; respondents in the Court of Appeals were the United States of America, the United States Nuclear Regulatory Commission, and John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford. Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("the public utilities") were intervenor-respondents in the Court of Appeals.

The Court is advised pursuant to Rule 28.1 of the Rules of the Supreme Court that General Public Utilities Corporation is the parent company of the public utilities and that GPU Service Corporation, Saxton Nuclear Experimental Corporation and GPU Nuclear Corporation are affiliates or related companies to the public utilities.

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On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS METROPOLITAN EDISON COMPANY *ET AL.*

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("the public utilities"), petitioners in No. 80-1656, submit this brief on the merits in these consolidated cases.

OPINIONS BELOW

The orders of the Court of Appeals denying the public utilities' petition for rehearing and suggestion for rehearing *en banc,* with a dissenting statement filed by four Judges (App. A and B to the public utilities' certiorari petition (hereinafter "Utilities' Pet.")) have not yet been reported. The panel decision of the Court of Appeals (Utilities' Pet., App. C) also has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1980. The appellate court's orders denying rehearing and rehearing *en banc* were entered on March 4, 1981. Petitions for writs of certiorari filed by the public utilities and by the government were granted on May 26, 1981. J.A. 109-10. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954 ("the Act"), as amended, 42 U.S.C. §2239(a), provides in relevant part:

> In any proceeding under this Chapter, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT OF THE CASE

This case arises from consolidated petitions to review two Orders issued on June 12, 1980 by the Nuclear Regulatory

Commission ("the Commission"). These Orders relate to cleanup activities undertaken after the accident at Three Mile Island Nuclear Station, Unit 2 ("TMI-2") owned by the public utilities.

The Court of Appeals below entered a declaratory judgment that the Orders were issued unlawfully because the Commission failed to hold a prior hearing on them, which hearing by implication had been requested by respondents. The issue in this case is whether the Commission is authorized by Section 189(a) of the Act to amend an operating license for a nuclear power plant without holding a prior hearing where one is requested *if* the Commission makes a finding that the license amendment has no health or safety significance.

The March 28, 1979 accident at TMI-2 resulted in serious damage to the nuclear fuel inside the reactor and accumulation of radioactive krypton-85 gas in the reactor containment building. Removal of the gas was necessary so that decontamination and cleanup of the facility could proceed. Utiiities' Pet., App. D at 45a-46a.

The operating license for TMI-2 issued by the Commission in February 1978 authorized limited releases of radioactive gases, including krypton-85, to the atmosphere. Utilities' Pet., App. D at 46a. Such releases are a normal and necessary part of nuclear power reactor operation and are common to all operating nuclear reactors. In the aftermath of the accident, the Commission undertook certain regulatory actions affecting the cleanup and specifically considered the problems associated with the accumulation of krypton gas.

On November 21, 1979, the Commission issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67738 (1979), J.A. 36, in which it stated that significant radioactive gas releases from the TMI-2 containment building would not be allowed without prior review and opportunity for public comment. This Statement of Policy was implemented on February 11, 1980, when the Commission issued an Order

prohibiting "venting or purging or other treatment of the reactor building atmosphere . . . until each of these activities has been approved by the NRC." 45 Fed. Reg. 11282 (1980), J.A. 39, 40-41.

After months of exhaustive review and consultation (R., Vol. 2, Tab 18, 19, 21, 23, 27; Vol. 3, Tab 33, 38), the Commission issued for public comment in March 1980 a draft environmental assessment on release of the krypton gas from the reactor building. 45 Fed. Reg. 20265, 21760 (1980), R., Vol. 4, Tabs 51, 53. After consideration of the public's comments on the draft assessment,[1] the Commission issued a final environmental assessment at the end of May, 1980. R., Vol. 5, Tab 69. The final environmental assessment examined a number of possible ways of decontaminating the reactor containment building atmosphere and concluded that all decon-

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[1] The draft environmental assessment and the two subsequent addenda to it elicited about 800 written comments from individuals and organizations. R., Vol. 5, Tab 69. In addition, the Commission held public hearings and met with representatives of citizen groups in the area around TMI-2 to discuss the draft environmental assessment and the alternatives to purging. R., Vol. 4, Tab 46, 47; Vol. 5, Tab 75. The Commission also consulted with Federal, State and local government agencies and with individuals and groups in the scientific community having expertise in radiation protection and related areas. *See, e.g.*, R., Vol. 2 Tab 31; Vol. 5, Tab 56, 59, 64, 68, 80, 81, 82; R., Vol. 5, Tab 69 at 10-1, 10-2. Among those consulted or submitting comments were the U.S. Departments of Energy, Interior, Transportation and Health, Education and Welfare; the Environmental Protection Agency; the Council on Environmental Quality; the Oak Ridge National Laboratory; the National Council on Radiation Protection and Measurements; as well as the State of Pennsylvania and the Union of Concerned Scientists. R., Vol. 5, Tab 80 at 3-4; NUREG-0662 (May, 1980) Vol. II, Tab 1, 5, 6, 7, 8, 9, 10 and 13. Each of these organizations or authorities agreed with the conclusion reached in the draft environmental assessment that the physical health impact on the public from purging would be negligible. R., Vol. 5, Tab 69 at 9-1 to 9-7.

tamination alternatives would have negligible impact on the public health and that "the preferred method for removing the krypton-85 from the reactor building" was by purging, *i.e.*, by controlled venting to the outside atmosphere. J.A. 88.

The Commission reviewed the final environmental assessment at two public meetings and at one meeting with the Advisory Committee on Reactor Safeguards ("ACRS"), a prestigious independent panel charged by statute with reviewing Commission licensing actions for their potential safety implications. *See,* 42 U.S.C. §2039; *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council,* 435 U.S. 519, 526 (1978); R., Vol. 5, Tab 80, 82, 83. These deliberations resulted in unanimous agreement that purging the TMI-2 reactor containment building atmosphere was the best way of eliminating the krypton-85 and that the health and environmental impacts from purging would be negligible.

The Commission then entered the two Orders at issue on June 12, 1980. One, entitled "Memorandum and Order", authorized the public utilities to "conduct a purging of the TMI-2 containment, commencing no sooner than 10 days from the date of this order, in accordance with the proposal recommended by the NRC Staff as presented to the Commission in the record for the proceeding." Utilities' Pet., App. E at 59a. The other Order, entitled "Order For Temporary Modification of License", made a temporary modification to the TMI-2 license to permit purging to occur at a faster rate than the license then allowed, but without increasing the total radioactive dose to the public permitted by the plant's license. Utilities' Pet., App. D at 45a-49a.

A hearing was not held on either Order prior to its issuance. The Commission believed that the Memorandum and Order was not a license amendment subject to the notice and hearing provisions of Section 189(a).[2] The Order for Tem-

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[2] The Commission believed that this Order authorizing purging simply restored pre-existing license authority that had been sus-

porary Modification of License was treated as a license amendment. That Order included an express finding that the license amendment it authorized presented "no significant hazards consideration" within the meaning of Section 189(a) of the Act. Utilities' Pet., App. D at 47a. The Order was made effective immediately. It provided that a hearing could be sought within 30 days by any party whose interest might be affected by it. The Order further provided that a request for a hearing would not stay its effectiveness. *Id.* at 48a.

On June 23, 1980, respondents People Against Nuclear Energy ("PANE") and Steven C. Sholly ("Sholly") filed a motion with the Commission asking it to reconsider its June 12, 1980 Orders. On the same day, Sholly and respondent Donald E. Hossler ("Hossler"), president of PANE, filed a petition for review of the two Orders with the United States Court of Appeals for the District of Columbia Circuit. Their petition sought to suspend the effectiveness of the Orders and further sought a declaratory judgment that amendments to the TMI-2 operating license required notice and a prior hearing. Respondents then filed a flurry of motions and petitions with the Courts of Appeals for the District of Columbia Circuit and the Third Circuit, seeking to enjoin the scheduled purging of the TMI-2 reactor containment building.[3] All motions for

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pended in the aftermath of the accident and was, therefore, not a license amendment. Utilities' Pet., App. D at 58a-59a. Whether the Commission properly characterized the Order is not at issue in this appeal.

[3] On June 26, 1980, the Court of Appeals for the District of Columbia Circuit denied Sholly and Hossler's motions for injunctive, declaratory and other temporary relief. Also, on June 26, 1980, the Commission denied respondents' motion for reconsideration of its June 12, 1980 Orders, J.A. 55. On June 27, 1980, the day before venting was to commence, Sholly and Hossler filed with the Commission a "Formal Demand for an Adjudicatory Hearing Prior to Venting Gas From Three Mile Island Unit 2." Intervenor-Respondents' Appendix filed with the Court of Appeals ("I.R. App."), at 190-99. Their demand was referred to an Atomic

injunctive relief were denied, and the actions in the two Circuits were consolidated in the District of Columbia Circuit.

Purging at TMI-2 began on June 28 and was completed on July 11, 1980. It resulted in lower off-site radioactive doses than anticipated, well within all permissible dose guidelines set forth in applicable Commission regulations, the requirements of the June 12 Orders and the limits set in the TMI-2 operating license. Supplemental Affidavit of Michael P. Morrell, dated August 15, 1980, Appendix B to "Brief for Intervenor-Respondents" in the Court of Appeals, paras. 6-9.

The consolidated review petitions went forward on respondents' request for a declaratory judgment that the Commission had deprived them of their statutory right to notice and a prior hearing on the TMI-2 license amendment and the Order authorizing purging. On November 19, 1980, a panel of the Court of Appeals for the District of Columbia Circuit held that the fourth sentence of Section 189(a) of the Act authorizes the Commission to omit prior *notice* of a proposed license amendment based upon a finding that the amendment presents "no significant hazards consideration," but that even where the Commission properly omits notice, it nevertheless is required to hold a prior "*hearing* on license amendments whenever interested parties request one." Utilities' Pet., App. C at 44a (emphasis added).

The Court concluded *sua sponte* that respondents' "continued interest in — and oposition to — the actions of the

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Safety and Licensing Board for a hearing. A prehearing conference was held by the Licensing Board on July 7 and 8, 1980, at which time Sholly appeared and voluntarily withdrew his motion and his request for a hearing on the purging orders. I.R. App. at 211-216. On July 8, 1980, PANE filed two actions in the Third Circuit Court of Appeals (Docket Nos. 80-1994 and 80-1995). These actions made the same allegations and sought the same relief already denied by the Commission and the Court of Appeals for the District of Columbia Circuit.

NRC at TMI-2 clearly constituted a request for a hearing", apparently because respondents had shown "continued interest in — and opposition to — the actions of the NRC at TMI-2" and "were among the many" (over 800 individuals and organizations) that submitted comments on the draft environmental assessment. Utilities' Pet., App. C at 39a, n.25. Therefore, under the court's view of the statute, the Commission was required to hold a hearing *prior* to making the Orders effective.[4]

Petitions for rehearing by the public utilities and the Commission and the public utilities' suggestion for rehearing *en banc* were denied by the Court of Appeals on March 4, 1981. Utilities' Pet., App. A at 2a and App. B at 19a. Four judges dissented from the denial of the public utilities' suggestion for rehearing *en banc* and filed a 15 page "Statement On Denial of Rehearing En Banc." Utilities' Pet., App. A at 3a-17a.

The Court of Appeals has stayed its mandate pending final disposition of this case.

SUMMARY OF THE ARGUMENT

1. A fair, contextual reading of Section 189(a) of the Atomic Energy Act shows that a prior hearing on a proposed amendment to a nuclear power plant's operating license is not required if the Commission determines that the amendment presents "no significant hazards consideration." This reading is compelled by the legislative history of the Act and the purposes sought to be served by the 1962 Amendments adding the no significant hazards consideration language at issue.

One of these purposes was to relieve the Commission of the necessity of holding a hearing every time an operating license for a commercial power reactor was amended. The

[4] The Court ruled that the Memorandum and Order authorizing purging was a license amendment (even though not labeled as such by the Commission) and was therefore also subject to the hearing upon request requirements of Section 189(a). Utilities' Pet., App. C at 41a-43a.

Commission's interpretation of Section 189(a) prior to the 1962 Amendments had resulted in numerous, time-consuming hearings, even for trivial license amendments, thereby creating the potential for an operational crisis within the agency as its workload increased.

The Commission had begun to deal with the problem administratively in late 1960, by approving a procedure in the *Vallecitos* proceeding whereby, if the Commission staff determined that a proposed amendment to an operating license presented "no significant new hazards consideration", it could authorize the amendment *without notice or a prior hearing*. The *Vallecitos* approach was brought to the attention of Congress in hearings held in 1961 and 1962 as well as in a Congressional study of the Commission regulatory process. The *Vallecitos* procedure was turned into AEC Regulation 50.59 in early 1962.

Against this backdrop, Congress passed the 1962 Amendments to the Atomic Energy Act, including the addition of a fourth sentence to Section 189(a). The fourth sentence was intended to adopt legislatively the no significant hazards consideration approach "presently being applied by the Commission under the terms of AEC Regulation 50.59." The legislative history is therefore clear that Congress intended to embrace the Commission's approach in *Vallecitos* and AEC Regulation 50.59 by adding the fourth sentence to Section 189(a).

The Court of Appeals ignored this legislative history and held that Section 189(a) waived the hearing requirements only for *non-contested* license amendments, although the notice requirements were waived whenever a "no significant hazards consideration" determination was made. The Court's interpretation creates a paradox (which the Court recognized) in giving interested parties an unlimited right to a prior hearing on a proposed license amendment without giving them the right to receive notice of the proposed action. The Court of Appeals' construction of Section 189(a) contravenes funda-

mental rules of statutory interpretation, frustrates the statute's purpose, and is inconsistent with the requirements of the Administrative Procedure Act and with fundamental notions of due process.

2. In the nineteen years since Section 189(a) was amended, the Commission has consistently interpreted the Act as authorizing it to dispense with prior notice and opportunity for a hearing on license amendments involving no significant safety issues. This interpretation, first expressed in *Vallecitos* and AEC Regulation 50.59, was reaffirmed in regulations issued by the Commission after the adoption of the 1962 Amendments and has been applied thousands of times (over 1500 times in the last four years alone) to approve license amendments lacking safety significance without notice or opportunity for a hearing. This consistent, long-standing interpretation by an agency of its governing statute should be given great weight by a reviewing court, particularly in the field of regulating nuclear energy where Congress has delegated broad authority to the Commission. *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO,* 367 U.S. 396 (1961). In summarily dismissing the Commission's intrepretation, the Court of Appeals ignored the purposes and policies underlining that interpretation and judicially imposed a new administrative requirement which seriously threatens to overwhelm the existing machinery for regulating nuclear energy.

Most license amendments which involve no significant hazards consideration are either neutral from a safety standpoint or actually improve safety. Yet, failure to issue such an amendment in a timely manner could cause an operating reactor to shut down or prevent it from returning to power. If prior hearings were required on license amendments presenting no significant safety issues, a delay of nine months or more on the issuance of many of the amendments would almost inevitably ensue, causing extensive plant shutdowns. There is no potential enhancement of public safety that outweighs the substantial detrimental effects of these shutdowns.

Amendments to operating licenses for commercial power reactors are made quite frequently, due to the very detailed procedures and requirements included in the licenses and the fact that any change in a plant's technical specifications requires a license amendment. Thus, if hearings were to be held upon request on license amendments without safety significance, the Commission's licensing machinery would, at the very least, be greatly encumbered and the Commission would have to divert its resources away from more important safety matters to accommodate such hearings.

The serious adverse consequences of the Court of Appeals' construction, without compensating benefits, requires that it be rejected, since a statute is to be read in a way that avoids oppressive results and permits an agency to fulfill its mandate unimpeded. *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 215 (1980).

ARGUMENT

I. The Language Of Section 189(a) Read In Light Of Its Legislative History Establishes That Congress Intended To Authorize The Commission To Amend A Nuclear Power Plant License Without A Prior Hearing If The Commission Determined That The Amendment Involves No Significant Hazards Consideration

1. Section 189(a) of the Atomic Energy Act divides licensing actions for nuclear power reactors into three categories: (1) construction permits, which require a mandatory hearing after thirty days notice and publication in the *Federal Register* (second sentence); (2) operating licenses or amendments to construction permits or operating licenses involving significant safety issues, which do not require a prior hearing if none is requested after thirty days notice and publication, but which do require a hearing if one is requested by an interested party (first and third sentence); and (3) amendments to construction permits or operating licenses where the Commission has made

a determination that the amendment "involves no significant hazards consideration", which require neither notice nor a prior hearing (fourth sentence).[5] This construction, though not free from ambiguity if based solely on the language of Section 189(a), is inescapable when the statute is read in light of its legislative history, particularly the purpose sought to be served by the amendment which added the "no significant hazards consideration" language at issue here.

Section 189(a) reached its present form in the 1962 Amendments to the Act, Pub. L. 87-615, 76 Stat. 409 (1962). As first enacted in 1954, Pub. L. 83-703, 68 Stat. 919 (1954), Section 189(a) contained only the first sentence of what is now the text of that provision.[6]

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[5] Section 189(a) reads in relevant part:

> In any proceeding under this Chapter, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit for a facility * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

[6] There is no indication that we have been able to find in the legislative history of the 1954 Act that remotely suggests that Congress intended to provide a forum in which interested parties might raise health and safety issues. The notice and hearing provisions of the Atomic Energy Act of 1954 were designed to assure all interested parties an opportunity to compete for licenses to construct and operate a nuclear power facility. 100 Cong. Rec. 10405 (1954),

The Commission's practice unde
tion 189(a) was to grant, if staff r
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amendments to either). *After* grant
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(March 1961), Vol. II at 409, 447;
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on Atomic Energy, 87th Cong.,
("Radiation Hearing") (Testimony o

Utilization of this procedure in
struction permit in the *PRDC* case,
criticism in Congress.[7] Members of

reprinted in III U.S. Atomic Energ
History of the Atomic Energy Act of 19
100 Cong. Rec. 10000, 10283-84, 11312
Atomic Energy Commission, Legislati
Energy Act of 1954 at 3073, 3238-39, 3

[7] Several factors contributed to Congr
the procedure utilized by the Commissio
the ACRS safety report had emphasized
involved a new technology (the fast br
pressed doubts that there was sufficien
assure safe operation of the reactor. *Se*
failed to give notice to the public of AC
for a period of time had refused to pro
to Congress. *Third,* there was a concern
sion had given financial aid to the
development, it had failed to keep suffi
promotional and regulatory responsibil
Regulatory Process, Vol. I at 27-30, Vo

Atomic Energy expressed the view that a public hearing should be held by the Commission on all applications for licenses to construct nuclear power reactors. Improving the Regulatory Process, Vol. II at 449. The result of this concern was the passage of the 1957 Amendments to the Act, which added a second sentence to Section 189(a), and established mandatory public hearings for both the construction permit and the operating license of a nuclear power reactor. Pub. L. 85-256, 71 Stat. 576 (1957).[8] *See,* Improving The Regulatory Process, Vol. I at 7. Unlike the 1954 Act, the legislative history of the 1957 Amendments makes it clear that Congress' primary concern was to ensure that the Commission's regulatory framework "would guarantee the most careful, impartial review of safety questions." Improving The Regulatory Process, Vol. II at 578 (Letter of Commissioner Olson). Congress felt that mandatory public hearings at the construction permit and operating license stages would "protect the health and safety of the public in the future as more reactors are constructed and operated throughout our country." Statement by Senator Anderson, March 21, 1957, on Bill to Establish Reactor Safeguards Committee and Require Public Reports and Public Hearings, *reprinted in* "Government Indemnity and Reactor Safety" Hearings Before the Joint Committe on Atomic Energy, 85th Congress, 1st Sess. (1957). There was, however, no discussion of license *amendments* in the legislative history of the 1957 Amendments to the Act.

The Commission interpreted the 1957 Amendments to require it to give notice and to hold a hearing *every time* a licensing action was taken, including every amendment to construction permits and operating licenses. Radiation Hearing at 260-261 (Testimony of Mr. Price); 303-304 (Testimony of

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[8] The second sentence of §189(a), as added in 1957, read:

> The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register on each application under section 103 or 104b for a license for a facility, and on any application under section 104c for a license for a testing facility.

Commissioner Olson). *See also,* AEC Regulatory Problems: Hearings Before Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. at 6 (1962) ("AEC Regulatory Hearing"), (Testimony of Commissioner Olson). This interpretation of the Act created "an extraordinary procedural requirement" for the Commission. Radiation Hearing at 308 (Testimony of Commissioner Graham). The Commission found itself involved in an inordinate number of time-consuming hearings even for trivial amendments, to the detriment of both applicants and the Commission itself. *See,* Improving The Regulatory Process, Vol. II at 487-489.[9]

Both Congress and the Commission came to regard this situation as disturbing. The Joint Committee on Atomic Energy asked its staff to review the Commission's regulatory process. The result was a study entitled "Improving the AEC Regulatory Process", in which the Joint Committee staff criticized the Commission's practice of holding hearings on all licensing actions:

> [T]he Commission has gone further in some respects than the law required, particularly in regard to the number of hearings required and the formality of procedures. The intent of the 1957 staff report was that AEC *safety proceedings* should be public and on the record. It would appear that the Commission has utilized the hearing process to extend the Commission's affirmative control over

[9] As Commissioner Olson illustrated, "the technical specifications often covered even the color of outbuildings, and in order to change them we had to go through the same process [of hearings]." AEC Regulatory Hearing at 7. A classic example of the regulatory quagmire created by the Commission's interpretation of the 1957 amendments was the *Yankee Atomic Electric Co.* operating license proceeding in which, after a half dozen hearings and at least nine ACRS reviews, the hearing examiner ordered a further ACRS review and a hearing on two subsequent license amendments, even though the amendments were minor in nature and would actually increase the safety of the reactor. *See,* Improving the Regulatory Process, Vol. I at 37-39.

> licensing to include startup operations and changes. While such control may be desirable, *it might be accomplished without unnecessary hearings, but on the public record, with a later opportunity for hearing* in the event of exceptions filed by any party or intervention.

Improving the Regulatory Process, Vol. I at viii (Letter of Transmittal, emphasis added.) The study concluded that the inadequacies in the Commission licensing procedures might well lead to its being unable to discharge its functions:

> These problems, and the others identified in Part IV of this study, have not as yet become critical because the AEC's workload and the peaceful uses of atomic energy have not progressed to the point where cumbersome organization and procedures produce an operational crisis or inadequate protection for the public. However, there is every indication that as the Commission's regulatory workload increases, it will be unable to successfully meet its many-sided responsibilities for the regulation and development of atomic energy.

Improving the Regulatory Process, Vol. I at 4.[10] In the staff's view, this was a situation that demanded corrective action by the Commission as well as by legislation. *Id.*

Meanwhile, the Commission had begun to grapple with the problem on its own. In the *Vallecitos* proceeding, *General Electric Company* (Vallecitos Boiling Water Reactor), 1 AEC 541 (1960), it authorized a simplified procedure whereby a

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[10] As of the time the Joint Committee on Atomic Energy Staff study was written (March, 1961), there were only twelve power reactors which had received, or were applying for, construction permits or operating licenses. Improving the Regulatory Process, Vol. II at 171. By contrast, there are at the present time about seventy nuclear power reactors licensed for operation, not to mention those under construction or those for which application has been made for construction permits or operating licenses. Utilities' Pet., App. F at 62a. Clearly, the difficulties identified by the Staff, if created today "by cumbersome organization and procedures", would render the Commission "unable to successfully meet its many-sided responsibilities."

license amendment found by the Commission staff to present "no significant new hazards considerations" could be approved directly by the staff without prior notice or opportunity for a hearing. Copies of the "no significant new hazards consideration" finding and the amendment authorization were filed in the public record of the proceeding so that interested parties could file exceptions or seek judicial review. Improving the Regulatory Process, Vol. II at 485. This simplified procedure was promptly applied in other cases. *See,* Improving The Regulatory Process, Vol. I at 39. It clearly met the intent of the 1957 legislation that (1) ". . . AEC safety proceedings should be public and on the record"; (2) but "without unnecessary hearings . . . with a later opportunity for hearing in the event of exceptions filed by any party. . . ." Improving The Regulatory Process, Vol. I at viii.

The Joint Committee study on improving the AEC regulatory process endorsed the *Vallecitos* approach, and noted that "[t]he handling of *changes* would be facilitated if the Commission's recent order in the *Vallecitos* case, could be broadened by statute or regulation to a general rule." Improving the Regulatory Process, Vol. I at 73, n.4 (emphasis added).

The Commission acted on this suggestion and promulgated AEC Regulation 50.59, which codified the practice adopted in the *Vallecitos* proceeding. 27 Fed. Reg. 5491, 5492-5493 (1962), J.A. 20, 23-26.[11] Under AEC Regulation

[11] AEC Regulation 50.59 read, in relevant part:

* * *

(e) With respect to request . . . for changes in technical specifications for a facility of a type described in §50.21(b) or §50.22, or a testing facility:

* * *

(2) If the Commission determines that the proposed change . . . does not present significant hazards considerations not described or implicit in the hazards summary report, it *may authorize such change* . . . without referral to the Advisory Committee on Reactor Safeguards for a

50.59, if the Commission staff found that a proposed amendment to a facility's license did not present significant hazards considerations, it could authorize the amendment without notice and *without a prior hearing*. On the other hand, if the staff found that the proposed change presented significant hazards considerations, the change had to be referred to the ACRS and the Commission had to order a public hearing.

In drafting the 1962 Amendments to Section 189(a), the Joint Committee on Atomic Energy was well aware of the problems raised by the Commission's post-1957 expansive reading of the hearing requirement as well as the Commission's administrative efforts to mitigate those problems through the *Vallecitos* procedure for handling license amendments. These matters were brought to the Joint Committee's attention from a variety of sources. They were reviewed in a detailed analysis of the Commission's regulatory process undertaken in 1961 by the University of Michigan Law School. *See,* Improving the Regulatory Process, Vol. II at 431-432, 464, 484-496. The *Vallecitos* approach was discussed extensively and endorsed by the Joint Committee's staff in its own study on which the 1962 amendments were founded. *See,* Improving the Regulatory Process, Vol. I at 35-37, 49-50, 73 at n.4. The *Vallecitos* approach was explained by Commissioner Olson in a letter responding to a series of inquiries from the Executive Director of the Joint Committee. *See,* Improving the Regulatory Process, Vol. II at 578-582. The success of the approach was also referred to by Mr. Olson in his testimony at the Joint Committee hearing on the proposed

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report and *without a prior public hearing,* upon finding that there is reasonable assurance that the health and safety of the public will not be endangered. J.A. 25, emphasis added.

The "Statement of Considerations" accompanying the new rule explained that 50.59 was based upon the procedure instituted in *Vallecitos.* J.A. 20.

amendments to the Act. *See,* AEC Regulatory Hearings at 6-7.[12]

Most importantly, the Joint Committee's final report on the bill that enacted the 1962 Amendments expressly adopted the *Vallecitos* approach as embodied in AEC Regulation 50.59:

> Accordingly, this section [Section 189(a)] will eliminate the requirement for a mandatory hearing except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or is-

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[12] The following exchange aptly summarizes the Commission's experience with the *Vallecitos* approach, as conveyed by Commissioner Olson to the members of the Joint Committee:

(Q) [Senator Pastore]: ". . . What has been the experience of the Commission under the rule of the *Vallecitos* case?"

(A) [Commissioner Olson]: "I feel that the course that we chose in the *Vallecitos* case of allowing the Division of Licensing and Regulation to make a determination as to whether an unreviewed safety issue was involved has cut cut nine-tenths of the hearings. There is no question but what in our eagerness to give full compliance to the law, as we found it on the books, that we painted ourselves into a corner. We were holding more hearings than we could handle. It was not because we wanted to. It was because we thought we were obliged to under the law. I think as a result of the understanding that was reached after our hearings last year in which we found it was the will of the committee — that their intent with respect to the amendment that they had put into the law — was that they did not quite share our literal interpretation of it. I think we arrived at a very workable result. I think it has really taken the bottleneck out of our hearing process. We were holding hearings on every change — the technical specifications included entirely too many things — and I think that the changes that resulted from the *Vallecitos* case have been extremely helpful to everybody." AEC Regulatory Hearing at 6-7.

> suance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." *This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.*

S. Rep. No. 1677, 87th Cong., 2d Sess. 7-8 (1962), *reprinted in* [1962] *U.S. Code Cong. & Ad. News* 2207, 2214 (emphasis added).[13] It bears repetition here that AEC Regulation 50.59 expressly provided in subsection (e)(2) that if a proposed license amendment did not present significant hazards considerations, the Commission was authorized to make the change "*without a prior public hearing.*"

It is thus abundantly clear that the 1962 Amendments were intended by Congress to vest discretion in the Commission to dispense with notice and opportunity for a hearing on proposed license amendments where the amendments had no significant safety implications. Congressional action in 1962 was directed at eliminating hearings where the license amendment was so trivial from a health and safety viewpoint that it did not merit a hearing. Improving the Regulatory Process, Vol. I at 52. Whether a hearing had been requested was irrelevant to the determination of whether a hearing was necessary.[14] The procedure selected by the Commission and

[13] This Court has noted "the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme" and has held that the Committee's actions demand "particular weight" in assessing legislative history. *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers AFL-CIO*, 367 U.S. 396, 408-09 (1961).

[14] As Professor David Cavers of the Harvard Law School testified before the Joint Committee:

> . . .[W]hether there has been a contest or not has practically no bearing on whether the reactor design is safe or risky. A contest initiated by an intervenor may merely throw light on the political situation in the State or district where the reactor is located. . .

AEC Regulatory Hearing at 41. *See also, id.* at 45.

Congress did not compromise the rights of the public because an interested party wishing to contest an amendment adopted without notice or a hearing under a "no significant hazards consideration" determination was protected by notice of the amendment's approval in the *Federal Register* and the opportunity to seek a subsequent hearing on the amendment or judicial review. *See*, Improving the Regulatory Process, Vol. I at 49-50.[15]

2. The Court of Appeals below interpreted the 1962 Amendments to Section 189(a) as requiring the Commission to hold a prior hearing on a license amendment whenever such a hearing is requested by an interested person. This interpretation reverts, for all practical purposes, to the pre-*Vallecitos* situation and makes it irrelevant whether the Commission has found that the amendment has no safety significance.[16]

The Court of Appeals below interpreted the 1962 Amendments as authorizing the Commission to dispense with a hearing *only* in *uncontested* cases. Utilities' Pet., App. C at 36a. That was the rationale for the *third* sentence of Section 189(a). S. Rep. No. 1677, 87th Cong., 2d Sess. 7-8 (1962). However, the *fourth* sentence of Section 189(a), which is the one at issue here, necessarily encompasses *contested* cases.[17] If

[15] A party who believes that he is threatened with immediate, irreparable injury by a "no significant hazards" license amendment is not without a remedy. He can seek *pendente lite* relief from a court of appeals, as respondents did here, pursuant to 28 U.S.C. §§2349(b) and 1651(a).

[16] The court below implicitly assumed that the "no significant hazards consideration" finding by the Commission regarding the Order for Temporary Modification of License was correct. Utilities' Pet., App. C at 33a-34a.

[17] While it is true that *as of 1962* most of the reactor licensing proceedings had been uncontested, at least one of them — the *PRDC* case — was hotly contested and led, after four years of litigation, to this Court's landmark decision in *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396 (1961). The Joint Committee Staff's study of the Commission's regulatory process referred to the delay caused by intervention in the *PRDC* case, and recom-

all that Congress had intended in 1962 was to address uncontested license amendments, the third sentence of Section 189(a) would have accomplished that very result and there would be no need for the fourth sentence. By the same token, if Congress had intended that the Commission's obligation to hold a hearing on a license amendment turns on whether one is requested, it need not have distinguished between amendments presenting "no significant hazards consideration" and other amendments with potentially more serious safety significance, for the same hearing requirements would attach to either kind. Indeed, the only conceivable purpose of the fourth sentence of Section 189(a), as read by the Court of Appeals, would be to save thirty days — which would hardly justify an amendment to the statute.

It is a cardinal rule of statutory interpretation that all parts of a statute must be given effect, and judicial construction may not render a portion of a statute redundant or nugatory. *Watt* v. *State of Alaska*, 451 U.S. _____, 101 S.Ct. 1673, 1678 (1981); *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940). Here, the only logical reading of the statute, and the one that preserves its meaning and purpose, is that Congress saw a qualitative difference between amendments having no safety significance and other amendments — and the fourth sentence is based on that

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mended that "[p]rocedures which are reasonably expeditious . . . seem necessary if the risk of the paralyzing effects of contested cases is to be avoided." Improving the Regulatory Process, Vol. I at 56. *See also, id.* at 48. The same study went on to warn that "as the completion of a reactor draws near, each new hearing is conducted under the Damoclean sword of a new intervention which, as far as existing rules provide, may reopen issues previously considered at the construction permit stage or introduce new matter which, though unimpressive on scientific or engineering grounds, could not be disposed of by a hearing examiner until the full cycle of hearing, findings and order had been completed. A persistent intervenor could prolong the process still further by presenting exceptions requiring Commission action and even by seeking judicial review." *Id.* at 57.

qualitative distinction, not on the happenstance of whether a hearing is requested in a given instance. This interpretation is also consistent with decisions by this Court recognizing that even where a statute grants the right to interested persons to request a hearing on agency action, the agency still retains discretion not to hold the hearing where the action is below the threshold of significance. *See e.g., Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980); *Weinberger* v. *Hynson, Westcott and Dunning, Inc., supra*, 412 U.S. at 620; *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

The Court of Appeals' strained reading of Section 189(a) acknowledges that the fourth sentence permits the Commission to dispense with notice of a proposed license amendment where the amendment presents "no significant hazards consideration." Utilities' Pet., App. C at 34a. However, in precisely the same circumstances, the Court of Appeals construed the Act as requiring a prior hearing on request. This obvious paradox was dismissed below as being no more than a paradox "in theory." Utilities' Pet., App. C at 35a, n.20. Yet, in the court's own words, "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice." *Id.* When construction of a federal statute would produce such an anomalous or absurd result, "it is to be avoided if at all possible." *Rector of Holy Trinity Church* v. *United States*, 143 U.S. 457, 461 (1892); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). Given the Court of Appeals' own admission, and in the absence of any compelling reason for its paradoxical reading of the statute, that reading should be rejected.

The effect of the decision below is to read Section 189(a) as affording an interested party the right to demand a prior hearing while simultaneously denying him the right to receive notice of the proposed action on which he is entitled to be

heard. Neither the Administrative Procedure Act, 5 U.S.C. §551 *et. seq.* ("APA"), nor fundamental notions of due process countenance such a result.[18] It is inconceivable that Congress, which incorporated the procedural safeguards afforded by the APA into the Act,[19] ever intended such an anomalous result. Rather, the intent to dispense with notice necessarily assumed the intent to dispense with a prior hearing where the proposed license amendment presents no significant hazards to public health and safety.

The legislative history of the 1962 Amendments indicates that Congress was aware of the futility of granting hearing rights if not accompanied by adequate notice. One of the

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[18] Under the APA, it is beyond dispute that, if a party is entitled to a hearing on proposed agency action, he is also entitled to receive adequate notice of that action. *See,* 5 U.S.C. §554(b); *North Alabama Express, Inc.* v. *United States*, 585 F.2d 783, 786 (5th Cir. 1978). Indeed, this notice requirement is fundamental to due process. *Schroeder* v. *City of New York*, 371 U.S. 208, 211-12 (1962). Notice of proposed action and opportunity for a hearing thereon cannot be disassociated. As this Court stated in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the right to a hearing "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *See also, Walker* v. *City of Hutchinson*, 352 U.S. 112, 115 (1956) ("the right to a hearing is meaningless without notice"). The statutory construction of Section 189(a) offered by the Court below impermissibly uncouples these two basic concepts.

[19] Section 181 of the Atomic Energy Act, 42 U.S.C. §2231, states that "[t]he provisions of the Administrative Procedure Act shall apply to all agency action taken under this chapter, and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act." The legislative history of the 1962 Amendments makes it clear that Congress intended the APA procedures to remain applicable to the licensing process established by the Amendments. *See* Senate Report No. 1677, 87th Cong., 2d Sess. 5-6, *reprinted in* [1962] U.S. Cong. & Admin. News at 2212-13.

criticisms leveled at the Commission hearing procedures was "[t]he failure to give reality to the right of intervention by providing adequate public notice of the safety questions to be considered at public hearings." Improving the Regulatory Process, Vol. I at 48; *see also, id.* at vii. Having made that criticism of the Commission's prior practice, Congress could not possibly have intended to grant a right to a hearing where it expressly withheld the right to receive notice.

3. The Court of Appeals cited certain portions of the legislative history of the 1962 Amendments to Section 189(a) to support its reading of the Act. Utilities' Pet., App. C at 36a-40a.[20] However, the legislative history excerpts quoted in the Court of Appeals' decision are either ambiguous,[21] taken

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[20] The Court of Appeals also cited its earlier decision in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924 (D.C. Cir. 1973), as holding that a prior hearing on a license amendment may not be denied if requested. *Brooks*, however, was a case dealing only with the Commission's obligation to give notice of a proposed amendment if it does not make a "no significant hazards consideration" determination and therefore is not relevant to the issue here. The Court of Appeals declined to follow a subsequent decision from the same circuit, *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069 (D.C. Cir. 1974) in which a different panel stated *twice*, after reviewing the legislative history of the 1962 Amendments to the Act, that a license amendment can be issued without opportunity for a hearing if the Commission determines that it involves no significant hazards consideration. 499 F.2d at 1078, text at n.22, and 1084, n.36.

[21] For example, identical statements on the floors of the House and Senate were made by the sponsors of the 1962 Amendments to the effect that the amendment to Section 189(a) "in no way limits the right of an interested party to intervene and request a hearing at some later stage." 108 Cong. Rec. 15746 (August 7, 1962) (remarks of Sen. Pastore); *id.* at 16548 (August 15, 1962) (remarks of Rep. Holifield). These general statements were interpreted by the Court of Appeals as inconsistent with the reading of the fourth sentence of Section 189(a) urged by the Commission and the public utilities. Utilities' Pet., App. C at 39a-40a. However, as the four dissenting

out of context[22], or are irrelevant to the issue of a right to a hearing on contested license amendments.[23] By contrast, the most relevant piece of legislative history, the reference in the

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Judges pointed out, the cited language can also be read as referring to the right to a hearing after the amendment has gone into effect. Utilities' Pet., App. A at 10a & n.6.

[22] For instance, the quoted statement from George F. Trowbridge is taken out of context. Utilities' Pet. App. A at 36a & n.21. In his testimony, Mr. Trowbridge was in fact advocating repeal of the mandatory hearing requirement for license amendments:

(Q) [Senator Anderson]: In discussing a possible revision of the law to limit hearing requirements to the initial construction permit, you especially note that hearing requirements should not extend to amendments to the permit.

What if the amendment involves a significant hazard, a consideration which had not been previously considered?

(A) [Mr. Trowbridge]: This is a possibility. Let me start with the premise that I do not advocate mandatory public hearings even on the initial construction permit. I am bound to say, however, that if they do any good, they are more likely to do good at the construction permit stage than any other.

I am bound to say, too, that they are likely to be less burdensome, less of a problem in timing, at the construction permit stage than any other. So I do not have a great deal of quarrel with those who advocate one mandatory hearing at the construction permit stage.

There can be amendments to construction permits that involve safety issues as important as the initial application. Mr. Price referred to that possibility this morning in his testimony. I think this will be the rare instance. Therefore, if there is a mandatory hearing requirement at the construction permit stage, *the problem of amendments needs to be left to the discretion of the AEC, because I know of no way of defining the kind of amendments on which AEC would thereafter have to hold hearings on and those on which it would not.* Radiation Hearing at 268 (Testimony of Mr. Trowbridge, emphasis added).

[23] For example, the testimony of Raoul Berger cited by the court did not discuss the conditions for waiving hearings in licensing

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> the Commission may hold a hearing after at least 30 days notice and publication once in the FEDERAL REGISTER or, in the absence of a request therefor by any person whose interest may be affected, may issue an operating license or an amendment to a construction permit or operating license without a hearing, upon 30 days notice and publication once in the FEDERAL REGISTER of its intent to do so. *If the Commission finds that no significant hazards consideration is presented by an application for an amendment to a construction permit or operating license, it may dispense with such notice and publication and may issue the amendment.*

10 C.F.R. §50.58(b) (1962) (emphasis added). This regulation is supplemented by Section 2.105(a)(3) of the Commission's Rules of Practice for Domestic Licensing Proceedings, 10 C.F.R. §2.105(a)(3)(1973), which in relevant part reads:

> (a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action with respect to an application for:
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> (3) An amendment of a license [for a facility] which involves a significant hazards consideration.

Under these regulations, which reflect the Commission's long standing interpretation of Section 189(a) of the Act, notice *is* required if a proposed amendment to a license "involves a significant hazards consideration". Otherwise, the Commission may dispense with such notice and publication and may issue the amendment immediately without a prior hearing, which was the procedure adopted by the Commission in this case.

This interpretation of Section 189(a) was again reiterated by the Commission in early 1980 (before the start of this litigation), when it issued proposed criteria for determining whether a license amendment involves "no significant hazards

consideration." In its Notice announcing the then proposed rule,[24] the Commission stated:

> Section 189a of the Act provides that, upon thirty days notice published in the FEDERAL REGISTER, the Commission may issue an operating license or an amendment to an operating license or an amendment to a construction permit for a facility licensed under section 103 or 104(b), or a testing facility licensed under section 104(c) without a public hearing if no hearing is requested by any interested person. However §189a permits the Commission to dispense with such thirty days notice and FEDERAL REGISTER publication with respect to the issuance of an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration. In cases where the Commission determines that there is no significant hazards consideration, the Commission may issue the amendment and then publish a notice in the FEDERAL REGISTER. In such cases, interested members of the public who wish to object to the amendment and request a hearing may do so, *but a request for hearing does not, by itself, suspend the effectiveness of the amendment.*

45 Fed. Reg. 20491-20492 (March 28, 1980, emphasis added).

In the last twenty years, the Commission has consistently applied its interpretation of the Act thousands of times, including the present case, to make license amendments effective immediately without notice or opportunity for a prior hearing. In the last four years alone, the Commission has issued over 1500 license amendments using the same procedure followed here. See Utilities' Pet., App. F at 66a-76a. Thus, for example, in *Portland General Electric Company* (Trojan Nuclear Plant), Docket No. 50-344 (Order dated July 7, 1978, at 2), the Commission stated: "Section 189 does permit immediate effectiveness of operating license amendments upon a determination that the amendment involves no significant hazards consideration.' " Similarly, in *Consumers Power Company*

[24] The Court of Appeals noted that this proposed regulation was invalidated by its decision. Utilities' Pet., App. C at 40a, n.26.

(Big Rock Point Nuclear Plant), LBP-74-15, 7 AEC 297, 298 (1974), the Licensing Board considered whether a request for a hearing on a proposed amendment to the technical specifications of an operating license dictated that a hearing be held. The Licensing Board answered in the negative, stating:

> [T]he Board is convinced that . . . it was the clear intent of Congress and the Commission to afford opportunity for a hearing whenever the license amendment *per se* might give rise to "significant hazards considerations," but that it was not their intent to require such opportunity where the amendment did not give rise to such considerations.

It is well established that an agency's long-standing interpretation of its governing statute is to be given great weight by a reviewing court. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This principle is particularly applicable where, as here, the interpretation is contemporaneous with the enactment of the statute, is supported by the statutory language, and has been applied consistently by the agency in prior decisions. *E.E.O.C.* v. *Associated Dry Goods Corp.*, 459 U.S. _____, 101 S.Ct. 817, 823 n.17 (1981); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). In the field of nuclear energy regulation, this principle has been applied time and again to uphold a reasonable construction by the Commission of the Act and its own regulations promulgated thereunder. *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League of America*, 423 U.S. 12, 14-15, (1975); *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408 (1961); *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 582 F.2d 166, 171 (2d Cir. 1978); *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission*, 533 F.2d 655, 658-659 (D.C. Cir. 1976); *Nader* v. *Nuclear Regulatory Commission*, 513 F.2d 1045, 1055-56 (D.C. Cir.

1975). Application of this principle seems particularly appropriate in this instance, for the agency is exercising the primary function delegated to it by Congress: determining what actions are required to protect the public health and safety.

2. The Court of Appeals' disregard for the Commission's interpretation of Section 189(a) was not only erroneous under established legal principles, but was also based on a misperception by the Court of the Commission's licensing practices and the grave practical consequences of abandoning the procedure that has heretofore been followed by the Commission in reviewing license amendment applications.

Amendments to operating licenses play an integral role in the Commission's regulatory program for all licensed power reactors. Operating license amendments are extremely numerous. At the time our certiorari petition was filed, there were about eight hundred license amendment actions pending. Utilities' Pet., App. F at 62a. The need for this large number of amendments arises from the extremely detailed and extensive procedures and requirements included in the operating license. *Id.* at 61a-62a.

As part of its review of license amendment applications, the Commission staff determines whether the amendment involves "no significant hazards consideration." Changes falling into that category involve both changes which are essentially neutral from a safety standpoint, as well as changes which are believed to improve safety. Utilities' Pet., App. F at 62a-63a. Of the hundreds of license amendment applications pending at any one time, many would be determined to present no significant hazards consideration. In the last four calendar years, the Commission has published in the *Federal Register* notices of *more than 1500 license amendments* which it has found to involve no significant hazards consideration. *Id.*

Failure to issue a license amendment in a timely manner could result in an operating reactor being shut down or in a reactor temporarily shut down (*e.g.*, for refueling or main-

tenance) being prohibited from returning to power. Utilities' Pet., App. F at 63a-64a. At the time our certiorari petition was filed, there were pending license amendment applications for approximately fifty plants which were likely to be characterized as having no significant hazards consideration, yet which could cause plant shutdown if not issued within a few months. *Id.*

If hearings are required on a license amendment, a delay of at least nine months in its issuance is almost inevitable. Utilities' Pet., App. F at 64a-65a. The adjudicatory procedures available under Commission rules, the time needed for the hearing itself, and the decisionmaking process make it unlikely that a hearing could be completed in less than that time. *Id.* As a result, license amendments already pending before the Commission which involve no significant hazards consideration, and yet are needed to avoid plant shutdown, would not be issued in a timely manner if hearings are required before issuance. This result is not likely to change in the future. Under the Court of Appeals' holding, at any point in the operating life of a reactor, a person meeting minimum standing requirements can demand a prior hearing on even the most trivial amendment to the facility's license — thereby effectively throttling the plant in an endless series of hearings and administrative and judicial appeals.[25] Thus, imposition of a prior hearing requirement for trivial license amendments having no health or safety significance raises the very real specter of needless plant shutdowns.

The significance of these shutdowns will be dramatic. Replacement power costs for a typical nuclear plant alone will cost the licensee and consumers between $250,000 and

[25] This is particularly true in light of the Court of Appeals' holding that a person's "continued interest in — and opposition to — the actions of the NRC at [a nuclear power plant] clearly constitute a request for a hearing." Utilities' Pet., App. C at 39a, n.25. Therefore, if any person has expressed "interest in a proceeding", *every* license amendment issued in connection with that proceeding might have to be preceded by a hearing — a complete regression to the pre-1962 situation sought to be remedied by Congress.

$500,000 for every day a nuclear power plant is shut down. Utilities' Pet., App. F at 66a. In some areas of the country, particularly the Northeast, replacement power will be generated in large part from imported oil, about 30,000 barrels per day for a 1000 MWe nuclear plant. *Id.* These consequences are multiplied for every nuclear unit forced off-line as a result of the procedures which the Court of Appeals' decision would require.

The effects of the Court of Appeals' decision on the Commission would also be severe.[26] Since hundreds of no significant hazards consideration license amendments are issued every year, it would be surprising if a large number of hearings were not requested. The Commission Staff does not have the resources to handle a significant increase in the

[26] Only last term, this Court had to decide whether a lower court had interpreted correctly the "opportunity for a hearing" provision of §402(a)(1) of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1342(a)(1). *Costle* v. *Pacific Legal Foundation,* 445 U.S. 198 (1980). The Court noted that the standard applied below erroneously divested the Environmental Protection Agency of its necessary discretion and went on to note:

> Neither can we ignore the fact that under the standard applied by the Court of Appeals, the EPA would be required to hold hearings on most of the actions it takes with respect to NPDES permit issuances and modifications. Hearings would be required even in cases, such as this, in which the proposed action only extends a permit's expiration date without at all affecting the substantive conditions that had been considered during earlier hearings. The Administrator advises us that each year the EPA grants about 100 requests for adjudicatory hearings under the NPDES program, issues about 2,200 permits, and takes thousands of actions with respect to permits. Brief for Petitioner 34-35; see *United States Steel Corp.* v. *Train,* 556 F.2d 822, 834, n. 14 (CA7 1977). Affirmance of the Court of Appeals' rationale obviously would raise serious questions about the EPA's ability to administer the NPDES program. See *Weinberger,* 412 U.S., at 621; *E.I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112, 132-133 (1977).

445 U.S. at 215. The interpretation of Section 189(a) by the Court below in this case raises the same "serious questions" that concerned the Court in *Costle.*

number of hearings. Utilities' Pet., App. F at 65a. Hearings on no significant hazards consideration amendments would siphon away resources which are more properly devoted to significant safety matters. *Id.* The Commission is also likely to find it more difficult to impose license amendments which it believes are needed since it would be faced with the possibility of a hearing before the amendment could be made effective. *Id.* And licensees are likely to tend not to seek license amendments in order to avoid the risk of plant shutdowns. *Id.* While the Commission might resort to the increased use of rulemaking in an attempt to avoid the delay and resource misallocation of hearings on these matters, rulemaking would be less flexible than case-by-case amendments and would likely take even more time. These developments are all inconsistent with improving plant safety.

Finally, the vast majority of operating license amendments — and particularly those involving no significant hazards considerations — are reversible.[27] Changes such as shortened surveillance intervals can be lengthened; revised calculational techniques can be replaced with the prior methods. Utilities' Pet., App. F at 64a. With this in mind, the requirement in the Court of Appeals' decision that there be a prior hearing upon request loses virtually all its potential value to the public. Even in cases where "irreversible action" is involved, a subsequent hearing would still have the salutary effect of assuring thorough Commission consideration. Therefore, no measurable benefits are inherent in the Court of Appeals' sweeping decision that might offset its serious adverse consequences.

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[27] The TMI-2 license amendment authorizing krypton purging to proceed at a faster rate was irreversible because once released the krypton could not be reclaimed. Even in this exceptional case, the insignificant radioactive releases which actually resulted from the purging demonstrate that the Commission was correct in authorizing the TMI-2 license amendment without a prior hearing and further that the Court of Appeals was correct in refusing to enjoin the purging because respondents were not, in fact, threatened with "irreparable injury."

CONCLUSION

The Court of Appeals has dictated a radical change in nuclear energy regulation, a change that turns the Congressional scheme for licensing nuclear power plants on its head. The decision below severely impacts on the Commission's regulatory function to the decided detriment of the Commission, the utility industry and consumers of electricity, without discernible benefit to the public.

For the reasons stated above, the public utilities pray that this Court reverse the judgment of the Court of Appeals, and return implementation of the Atomic Energy Act to the Commission where it properly belongs.

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Respectfully submitted,

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